

KOBRE & KIM

800 THIRD AVENUE
NEW YORK, NEW YORK 10022
WWW.KOBREKIM.COM
TEL +1 212 488 1200

April 21, 2022

VIA ECF

The Honorable Ona T. Wang
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Kobre & Kim v. Commodity Futures Trading Commission*,
19 Civ. 10151 (LAK) (OTW)

Dear Judge Wang:

Plaintiff Kobre & Kim LLP initiated the above-referenced action under the Freedom of Information Act to compel Defendant Commodity Futures Trading Commission (the “CFTC”) to produce certain documents relevant to the public’s understanding of the CFTC’s settlement and confidentiality breaches in *Commodity Futures Trading Comm’n v. Kraft Foods Grp., Inc.*, Case No. 15-cv-2881 (N.D. Ill.) (hereafter, “*Kraft*”). We write to respectfully apprise the Court of a recent order issued by the Northern District of Illinois in *Kraft* on April 15, 2022, attached herewith (as Exhibit A), which further supports Kobre & Kim’s Opposition to Defendant’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (Kobre & Kim’s “Motion”). *See* Dkt. 36, 38.

In its Motion, Kobre & Kim argued, among other things, that the government misconduct exception bars the CFTC from relying on FOIA exemptions to withhold responsive documents from public disclosure. *See* Dkt. No. 38 at 17, Dkt. No. 44 at 7-8. The CFTC asserted in response that “even if the Court does determine that as a matter of law, a showing of governmental misconduct may abrogate an otherwise proper assertion of Exemption 5 ..., Plaintiff has not demonstrated the sort of extreme wrongdoing that would permit its application here.” *See* Dkt. No. 41 at 12.

On April 15, 2022, the Northern District of Illinois issued factual findings that the CFTC, by acting in willful and bad faith contempt of court, struck “foul blows” that “violated the public trust.” For the Court’s convenience, relevant portions of that order are excerpted below:

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- “Although this Court need not find willfulness or bad faith to hold the CFTC in contempt ..., the facts here overwhelming support the prior contempt finding by this Court.” *Kraft*, Dkt. No. 402 at 4.
- “[T]he record confirms that the CFTC expressly agreed to abide by the confidentiality requirements, and then intentionally worked to unilaterally circumvent them with the CFTC Press Materials[, and] Kraft proffered compelling facts showing that the CFTC engaged in improper gamesmanship in finalizing the draft Consent Order and then publishing the CFTC Press Materials.” *Id.* (internal citations omitted)
- “Moreover, Kraft’s evidence also comports with this Court’s own observations (both on the record and off the record during the settlement conference) that Kraft’s request for the confidentiality provision constituted a material term to Kraft, and that the CFTC acted willfully, and in bad faith, in publishing the CFTC Press Materials after agreeing not to engage in such conduct.” *Id.* at 4-5.
- “Beyond the Consent Order, the record also confirms that the CFTC willfully violated this Court’s orders concerning participation in settlement negotiations when the CFTC intentionally disclosed (and in part misrepresented) the contents of the settlement conference discussions in bad faith. Among other concerns, CFTC’s misconduct here raises troubling concerns for the future, because its actions fundamentally erode the long-established protocols for settlement conferences in both state and federal court... Future litigants should take note of the CFTC’s position that consent orders only bind the CFTC, but not its commissioners or agents who, apparently, may act with impunity.” *Id.* at 5.
- “Here, the CFTC struck foul blows. Its conduct in this case violated the public trust, as well as the CFTC’s own core values and its long tradition of providing excellent service to the nation.” *Id.* at 6.

Kobre & Kim respectfully submits that the Northern District of Illinois’s reasoned and factually supported contempt ruling establishes the applicability of the governmental misconduct exception, as well as the public’s right to obtain information about that misconduct.

Respectfully,

/s/ Benjamin J.A. Sauter

Benjamin J.A. Sauter

George Stamatopoulos

David H. McGill